UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KARAN PERSAUD,	:	
Petitioner,	:	01 Civ. 2048 (JSR) (DF)
-against-	:	**REPORT AND RECOMMENDATION**
EDWARD J. McELROY, Director Regional, Immigration and Naturalization Service,	:	
Respondent.	:	

TO THE HONORABLE JED S. RAKOFF, III, U.S.D.J.:

Petitioner Karan Persaud ("Petitioner") seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2241, challenging his order of removal from the United States. (*See* Pet. at 2.)[1] Liberally construed,[2] the petition requests habeas relief on the grounds that Petitioner was denied his due process right to a full and fair hearing because:

(1) the Board of Immigration Appeals ("BIA") wrongfully failed to consider his ability to earn a living in the United States, which should have made him eligible for a suspension from deportation;

(2) the Board of Immigration Appeals wrongfully failed to consider the "hardship" factors that should have warranted a suspension from deportation;

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[1] "Pet." refers to Petitioner's petition for a writ of habeas corpus under 28 U.S.C. § 2241, filed February 9, 2001.

[2] *See Simmons v. Abruzzo*, 49 F.3d 83, 87 (2d Cir. 1995) ("[t]he complaint of a *pro se* litigant is to be liberally construed in his favor") (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972)); *Williams v. Kullman*, 722 F.2d 1048, 1050 (2d Cir. 1983) (where a petitioner is proceeding *pro se* and "lack[s] expertise," the Court "should review [his] habeas petition[] with a lenient eye"); *see, e.g., Akinlade v. United States*, 213 F.3d 625 (Table), No. 99-2645, 2000 WL 572913, at **2 (2d Cir. May 11, 2000) (applying liberal interpretation rule to § 2241 habeas petition).

(3) as a native of Guyana, he should not have been ordered removed to the United Kingdom;

(4) he was wrongfully denied the right to consult with the Guyanese Embassy prior to his hearing; and

(5) the stated basis for his removal – that he was convicted of an "aggravated felony" – was insufficient, because he was not, in fact, convicted of an aggravated felony, under the relevant definition.

(*See* Pet. Mem. at 1-6.)[3]

Respondent, in turn, seeks dismissal of the habeas petition on the ground that Petitioner's claims are without merit. (*See* Resp. Opp. at 2-6.)[4] For the reasons set forth below, I recommend that the petition be dismissed.

BACKGROUND

Petitioner is a native and citizen of Guyana (R. at 86, 96),[5] who entered the United States as a lawful permanent resident on December 27, 1983. (R. at 6, 86, 96.) On July 28, 1999, after pleading guilty to assault in the second degree, a violation of Section 120.05 of the New York Penal Law, Petitioner was sentenced to a determinate prison term of five years. (R. at 6, 84, 86.)

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[3] "Pet Mem." refers to Petitioner's Memorandum of Law in support of his habeas petition, filed March 12, 2001.

[4] "Resp. Opp." refers to Respondent's supplemental letter in opposition to Petitioner's habeas petition, dated October 3, 2001. Respondent's original letter in opposition, dated June 6, 2001, requested that this Court defer consideration of the petition until after the United States Supreme Court issued its decision in the case of *Calcano-Martinez v. INS*, 232 F.3d 328 (2d Cir. 2000). The Supreme Court issued its opinion in *Calcano* on June 25, 2001. *See Calcano-Martinez v. INS*, 533 U.S. 348 (2001). In *Calcano*, and in its sister case, *INS v. St. Cyr*, 533 U.S. 289 (2001), the Supreme Court held that aliens convicted of aggravated felonies may properly bring habeas petitions to the district courts for review of final removal orders. *Calcano,* 533 U.S. at 351; *St. Cyr*, 533 U.S. 314.

[5] "R." refers to the certified record of Petitioner's administrative removal proceedings, annexed as Exhibit A to Respondent's June 6, 2001 letter.

On November 29, 1999, while Petitioner was incarcerated, the Immigration and Naturalization Service ("INS") commenced removal proceedings against Petitioner by serving a Notice to Appear. (R. at 92-93.) The Notice to Appear charged that Petitioner, as a result of his criminal conviction of an "aggravated felony," was removable pursuant to Section 237(a)(2)(A)(iii) of the Immigration and Naturalization Act of 1952 ("INA"). (*See* R. at 96; 8 U.S.C. § 1227(a)(2)(A)(iii).)[6] On January 20, 2000, Petitioner appeared *pro se* before Immigration Judge Mitchell Levinsky for removal proceedings. (R. at 69.) At that hearing, Petitioner indicated that he would not be appealing his conviction, and the court informed Petitioner of his rights to appeal and to introduce evidence on his own behalf. (*Id*. at 71-72.) The proceedings were then adjourned, in order to allow Petitioner to attempt to obtain an attorney. (*Id*. at 72.)

Having been unable to obtain representation, Petitioner again appeared *pro se* before the Immigration Judge on April 26, 2000. At that time, Petitioner admitted his conviction for assault in the second degree and his five-year sentence. (R. at 76-77.) He further acknowledged that a conviction for an aggravated felony would render him removable. (*Id.*)[7] Petitioner argued,

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[6] Section 237(a)(2)(A)(iii) of the INA states that "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii).

[7] Although the Immigration Judge's decision indicated that Petitioner "conceded removability" (R. at 65), it is unclear whether Petitioner in fact admitted that he was removable, or merely acknowledged the law under which the INS sought to have him removed:

> THE COURT: The laws of immigration say[] you're removable from the United States because you've been convicted of an aggravated felony, which is defined as a crime of violence, the assault, for which a sentence of one year or more is imposed. Does that sound right?
>
> PETITIONER: Yes, sir.

however, that he was entitled to apply for relief in the form of suspension from deportation under Section 212(c) of the INA. (R. at 65, 79-81.) Petitioner also designated the United Kingdom as the country to which he should be removed, if at all, and the INS requested an alternative removal order to Guyana. (*Id*. at 78-79.)

During the hearing, and in a subsequent oral decision, the court determined that, "[b]ased on [Petitioner]'s admissions and the evidence of record, [Petitioner]'s removability has been established by evidence which is clear and convincing for the charge set out in the Notice to Appear." (R. at 65.) With respect to Petitioner's request for relief under Section 212(c) of the INA, the court informed Petitioner that such relief was unavailable to him, as it was "only available to an alien in deportation proceedings on or before April 24, 1996." (*Id*.)[8] Further, the court determined that Petitioner's conviction for assault in the second degree was a conviction for an aggravated felony, as defined under Section 101(a)(43)(f) of the INA, thus barring Petitioner from cancellation of removal under Section 240A(a). (*Id.; see also supra* n.8.) The judge therefore ordered Petitioner removed from the United States to the United Kingdom or, if the United Kingdom would not or could not accept Petitioner, to Guyana. (*Id*. at 65-66.)

On May 19, 2000, Petitioner filed a Notice of Appeal with the BIA. (*See* R. at 37-61.) On appeal, Petitioner argued that his removal would impose extreme hardship upon his wife, a

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(R. at 77.)

[8] Section 212(c) was repealed, as of April 1997, by Section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"). In repealing Section 212(c), IIRIRA Section 304(b) replaced that section's waiver of deportation provision with a "cancellation of removal" provision, under a new Section 240A. *See* 8 U.S.C. § 1229b(a); discussion *infra* at 7-8.

naturalized United States citizen, and his daughter, born in the United States. (*Id*. at 38-40, 54.)[9] Petitioner also contended that, despite his conviction for assault in the second degree, he did not commit a "violent act." (*Id*. at 54, 56.) In addition, Petitioner claimed that he was never informed of his right to contact a consular officer upon his arrest, as mandated by Article 36(1) of the Vienna Convention.[10] (*Id*. at 56.) Petitioner therefore requested a suspension of deportation. (*Id*.) In response, the INS argued that Petitioner was statutorily ineligible both for a waiver of removal under the repealed Section 212(c) and for cancellation of removal under Section 240A(a). (*Id*. at 32.)

On October 27, 2000, the BIA dismissed Petitioner's appeal. (R. at 30-31.) Specifically, the BIA affirmed Petitioner's removability under Section 237(a)(2)(A)(iii) of the INA and reiterated Petitioner's ineligibility for relief in the form of cancellation of removal. (*Id*.) The BIA further found no merit to Petitioner's argument that he was erroneously denied an opportunity to consult with the Guyanese Embassy. (R. at 30.)

On May 5, 2000, Petitioner filed a Notice of Motion to Reconsider. (R. at 6-27.) In that motion, Petitioner, for the first time, challenged the designated country of removal. (*Id*. at 8-14.) On January 25, 2001, the BIA denied the motion on the ground that Petitioner had failed to raise any "new legal argument or an aspect of the case which was overlooked." (*Id.* at 2 (citation omitted).) The instant petition followed.

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[9] While Petitioner did not cite specifically to former Section 212(c) in his appeal to the BIA, relief in the form of "suspension of deportation for hardship and humanitarian reasons" was previously available under that section. (R. at 40, 56.)

[10] Vienna Convention on Consular Relations, April 24, 1963, art. 36, 21 U.S.T. 77, 596 U.N.T.S. 261, 1967 WL 18349 (ratified Nov. 24, 1969) ("Vienna Convention").

DISCUSSION

Petitioner challenges his November 1999 order of removal on a number of grounds related to his due process right to a full and fair hearing. His first two arguments are that he should have been considered to be eligible for a discretionary suspension of deportation, because (1) he was a legal resident of the United States and "could earn a living" here, and (2) removal would result in extreme hardship to his family. (Pet. Mem. at 1, 3.) Petitioner next argues that the Immigration Judge wrongly determined that Petitioner should be removed to the United Kingdom, or to Guyana as an alternative, if the United Kingdom would not accept him. (*Id.*) Petitioner further asserts that the INS failed to notify Petitioner of his right under the Vienna Convention to communicate with a consular official from Guyana. (*Id*. at 1-2, 3, 5.) Finally, Petitioner claims that he should not have been ordered removed on the basis that he committed an "aggravated felony," because his record of conviction did not establish that "the conduct of which [he] was convicted satisfie[d] the elements necessary to qualify the offense under [the] relevant aggravated felony definition." (*Id*. at 3-4 (citations omitted).)

A. Standard of Review

In reviewing an agency determination, this Court must generally accord substantial deference to the agency's interpretation of the statutes it is charged with administering. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984); *Sutherland v. Reno*, 228 F.3d 171, 173-74 (2d Cir. 2000); *Michel v. INS*, 206 F.3d 253, 260 (2d Cir. 2000). Further, in post-*Chevron* cases, the Second Circuit has held that the BIA is entitled to deference when interpreting various provisions of the Immigration and Nationality Act, provided that those interpretations are "reasonable." *Michel*, 206 F.3d at 260. In contrast,

"courts owe no deference to an agency's interpretations of state or federal criminal laws, because the agency is not charged with the administration of such laws." *Id*. at 262 (citation omitted).

B. Petitioner's Claims

Claims 1 and 2: Eligibility for Suspension of Deportation

In his first two claims, Petitioner argues that the BIA improperly refused to consider his eligibility for a suspension of deportation. Respondent correctly argues, however, that relief in the form of "suspension" of deportation was simply not available to Petitioner, as the statute providing for such relief was repealed prior to Petitioner's removal proceedings. (*See* Resp. Opp. at 5-6.)

Petitioner's argument is based on former Section 212(c) of the INA, which provided:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General.

8 U.S.C. 1182(c) (repealed Sept. 30, 1996). This provision was interpreted by the BIA "to authorize any permanent resident alien with 'a lawful unrelinquished domicile of seven consecutive years' to apply for a discretionary waiver from deportation." *St. Cyr*, 533 U.S. at 295 (citation omitted). Thus, prior to September 30, 1996, aliens who pleaded guilty to, or who were convicted of, crimes for which they were deportable, were nonetheless entitled to seek a discretionary waiver of deportation under former Section 212(c). This discretionary waiver was available if the alien could establish, among other things, that "deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child,

who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. § 1254(a).

In 1996 and 1997, AEDPA and IIRIRA amended and repealed various sections of the INA, including the provision establishing eligibility to seek such discretionary waivers. First, effective April 24, 1996, Section 440(d) of AEDPA eliminated Section 212(c) waiver hearings for aliens convicted of aggravated felonies, drug offenses, certain weapons or national security violations, and for multiple convictions involving crimes of moral turpitude. *See* 110 Stat. 1277 (amending 8 U.S.C. § 1182(c)). Congress then passed IIRIRA, which repealed Section 212(c) entirely and replaced it with a new provision, Section 240A, granting the Attorney General the authority to "cancel" removal only for a narrow class of deportable aliens who had not been convicted of an aggravated felony. *See* 8 U.S.C. § 1229b.[11] IIRIRA took effect on April 1, 1997. *See id.*

Thus, in November 1999, when Petitioner entered removal proceedings (R. at 92), Section 212(c) had already been repealed, and any discretionary cancellation of removal under Section 240A would only have been available to Petitioner if he had not been convicted of an aggravated felony. As discussed further below *(see infra* at 12-19), Petitioner was in fact convicted of a crime that is appropriately categorized as an "aggravated felony." Therefore, Petitioner was not eligible for cancellation of removal, and I recommend that his first two claims be dismissed.

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[11] Specifically, Section 1229b(a) states that the Attorney General may cancel removal in the case of a deportable alien if the alien: "(1) has been an alien lawfully admitted for permanent residence for not less than 5 years, (2) has resided in the United States continuously for 7 years after having been admitted in any status, and (3) has not been convicted of any aggravated felony." *Id.*

Claim 3: Appropriateness of Designated Country of Removal

Petitioner's third claim appears to challenge that aspect of the removal order that specified that he be removed to the United Kingdom, and alternatively to Guyana, should the United Kingdom not accept him. (R. at 79; *see also* Pet. Mem. at 1,3,5.) To the extent that this even states a claim on habeas review, it cannot be reviewed, as Petitioner did not exhaust all administrative remedies "available as of right" before seeking judicial review this claim. *See* 8 U.S.C. § 1252(d)(1).

Generally, "a party may not seek federal judicial review of an adverse administrative determination until the party has first sought all possible relief within the agency itself." *Howell v. INS*, 72 F.3d 288, 291 (2d Cir. 1995) (internal quotations and citation omitted). This exhaustion requirement is waived only where grounds are raised "that could not have been presented in the prior judicial proceeding" or where "the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order." 8 U.S.C. § 1252(d)(1); *see also Howell*, 72 F.3d at 291. Here, Petitioner did not raise a challenge to the country to which he was ordered deported until he filed a motion for reconsideration by the BIA pursuant to 8 C.F.R. § 3.2(b). (R. at 8-14.) A motion to reconsider, however, merely seeks reexamination of a court's or other tribunal's original decision for "alleged errors in appraising the facts and the law." *Matter of Cerna*, Int. Dec. 399, 1991 WL 353528 (BIA Oct. 7, 1991). "The very nature of a motion to reconsider is that the original decision was defective in some regard." *Id.* Further, "a motion for reconsideration asks the [court or other tribunal] to reevaluate its decision on the existing factual record." *Zhao v. U.S. Dept. of Justice*, 265 F.3d 83, 91 (2d Cir. 2001). It was therefore inappropriate for Petitioner to attempt to raise a new claim before the BIA in the

context of a reconsideration motion, and it cannot now be said that this new claim was exhausted.

In any event, the Immigration Judge properly permitted Petitioner to designate the country to which Petitioner wanted to be removed, as required by Title 8 of the United States Code, Section 1231(b)(2)(A).[12] As the relevant regulation details, the country of removal will be the country designated by the alien, and the Immigration Judge "shall then specify and state for the record the country, or countries in the alternative, to which the alien's removal will be directed pursuant to [8 U.S.C. § 1231(b)] if the country of his or her designation will not accept him or her into its territory, or fails to furnish timely notice of acceptance, or if the alien declines to designate a country." 8 C.F.R. § 240.10(f).

In response to questioning by the Immigration Judge, Petitioner designated the United Kingdom as the country to which he wished to be removed, and the Immigration Judge directed removal to the United Kingdom, with an alternate removal order to Guyana. (R. at 78-79.) There is no evidence to suggest that Petitioner did not knowingly and voluntarily make his designation, or that Petitioner was deprived of any substantive right in this proceeding. In addition, the Attorney General's authority to remove Petitioner to a designated country is restricted only if Petitioner's "life or freedom would be threatened in that country because of [his] race, religion, nationality, membership in a particular social group, or political opinion," *see*

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[12] This section states, in relevant part, that an alien present in the United States who has been ordered removed: "(i) . . . may designate one country to which the alien wants to be removed, and (ii) the Attorney General shall remove the alien to the country the alien so designates." *Id.* Further, the Attorney General may disregard such a designation if, among other things, "the government of the country is not willing to accept the alien into the country." 8 U.S.C. § 1231(b)(2)(C). The alien would then be removed to a country of which he is a "subject, national, or citizen." 8 U.S.C. §1231(b)(2)(D).

8 U.S.C. § 1231(b)(3)(A), and Petitioner has not demonstrated that this would be the case with respect to the United Kingdom. With respect to Guyana, Petitioner merely indicated that he would have "no place to go to, no home to go to, no job to go to, nobody to go to." (R. at 78.)

For these reasons, I recommend that Petitioner's third claim be dismissed as unexhausted and, in any event, without merit.

Claim 4: Right to Consult with the Guyanese Embassy

Relying on the Vienna Convention, Petitioner claims that he was deprived of due process when he was denied the opportunity to consult with the Guyanese Embassy prior to his hearing before the Immigration Judge.[13] (Pet. Mem. at 5.) Upon reviewing this claim on appeal, the BIA determined that Petitioner "made no showing that he suffered any prejudice as a result of this alleged error, or even argued that any prejudice resulted." (R. at 30-31 (citing *Douglas v. INS*, 28 F.3d 241 (2d Cir. 1994); *Waldron v. INS*, 17 F.3d 511 (2d Cir. 1994)).) The BIA additionally noted that, during his hearing, Petitioner never expressed "any desire to consult with anyone at the Guyanese Embassy, and [that] there [was] a dearth of evidence that [Petitioner] was in any manner prevented from making such contact." (R. at 31.)

In *Waldron*, the Second Circuit determined that the Vienna Convention and regulations mandating communication with consular officials were not provisions affecting "fundamental rights with constitutional or federal statutory origins," and therefore that a proceeding which

[13] Article 36(1)(b) of the Vienna Convention provides that the authorities of a "receiving state" – here, the United States – shall, without delay, inform any detained foreign national of his right to have the "consular post" of a "sending state" – here, Guyana – notified of his detention. Similarly, the corresponding regulation states that "[e]very detained alien shall be notified that he or she may communicate with the consular or diplomatic officers of the country of his or her nationality in the United States." 8 C.F.R. § 236.1(e).

violated those provisions may only be invalidated "upon a showing of prejudice to the rights sought to be protected by the subject regulation." 17 F.3d at 518; *see also United States v. De La Pava*, 268 F.3d 157, 164-65 (2d Cir. 2001) ("[T]he consular-notification provision of the Vienna Convention and its related regulations do not create any 'fundamental rights' for a foreign national.").

Here, Petitioner has neither claimed nor demonstrated that the INS's failure to afford him an opportunity to communicate with Guyanese officials "prejudiced him in his preparation of a defense to the deportation charges," *Waldron,* 17 F.3d at 518-19, and, therefore, the BIA determination that this claim was without merit cannot be considered unreasonable, *see Michel*, 206 F.3d at 260.[14] Accordingly, I recommend that this claim be dismissed.

Claim 5: <u>Removability for Conviction of an "Aggravated Felony"</u>

Petitioner's final claim relates to the basis for his removal. The Immigration Judge found that the crime of which Petitioner was convicted in 1999 (second degree assault) was an aggravated felony, and that Petitioner was therefore removable under INA Section 237(a)(2)(A)(iii), and the BIA affirmed that determination. Further, the BIA determined that Petitioner's aggravated felony conviction made him ineligible for cancellation of removal under Section 240A(a). (*See supra* at 5.) Because this Court does not defer to an agency's interpretations of state or federal criminal laws (*see supra* at 6-7), the Court must review *de novo* the question of whether Petitioner committed an "aggravated felony," as defined by federal law.

[14] The BIA also noted that there has been an "extensive debate regarding what rights, if any, [Petitioner] may have" under the Vienna Convention and relevant regulations. (R. at 31; *see also De La Pava*, 268 F.3d at 165. This Court, however, need not reach the question of whether the Vienna Convention affords Petitioner a private right of action, because, in any event, there is no evidence that a due process violation has occurred in this case.

See Dalton v. Ashcroft, 257 F.3d 200, 203-04 (2d Cir. 2001); *Michel*, 206 F.3d at 262 (citation omitted). Although there appears to be no existing authority directly addressing the particular issues raised by Petitioner's claim, I conclude, for the reasons set forth below, that the BIA's determination that Petitioner's crime was an aggravated felony was correct.

(a) Definition of an "Aggravated Felony"

An "aggravated felony" is statutorily defined in the INA and includes within its scope a federal or state conviction for a "crime of violence," as defined in Section 16 of Title 18 of the United States Code, for which the term of imprisonment is at least one year. 8 U.S.C. § 1101(a)(43)(F). In turn, the relevant definition of a "crime of violence" includes either: "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16.

In opposition to the petition, the government argues that the second degree assault of which Petitioner was convicted is an aggravated felony because it meets the statutory definition of a "crime of violence," for which the term of imprisonment is at least one year. (Resp. Opp. at 5-6.)

(b) New York Penal Law § 120.05

New York's second degree assault statute, New York Penal Law Section 120.05, covers various types of assault. Petitioner was convicted pursuant to Subsection 6 of that statute, which is sometimes referred to as the "felony assault" provision. That subsection states, in relevant part, that a person is guilty of assault in the second degree when, "[i]n the course of and in

furtherance of the commission or attempted commission of a felony . . . he, or another participant if there be any, causes physical injury to a person other than one of the participants." *Id.*

(i) Divisibility of New York Penal Law § 120.05

Petitioner contends that his conviction was under a "divisible statute," and that the record of his conviction does not establish that his conduct "satisfie[d] the elements necessary to qualify the offense under the relevant aggravated felony definition." (Pet. Mem. at 2, 3-4.) Liberally construed, this claim asserts that Petitioner was not, in fact, convicted of a crime of violence within the meaning of the governing statute, and that he was not, therefore, subject to removal. (*See id.*)

In the immigration context, the Second Circuit has held that, when a criminal statute is "divisible" into multiple categories of offense conduct – some but not all of which constitute crimes of violence, and therefore removable offenses – a court may refer to the record of conviction to determine whether the alien's criminal conviction is for a removable offense. *See, e.g., Sutherland,* 228 F.3d at 177 n.5 (citing *In re Sweetser*, Int. Dec. 3390, 1999 WL 311950 (BIA May 19, 1999)). As noted in *Sweetser,* "[t]his approach does not involve an inquiry into facts previously presented and tried. Instead the focus is on the elements required to sustain the conviction." *Sweetser,* 1999 WL 311950.

Given the various offenses encompassed within Section 120.05 of the New York Penal Law, the first question for this Court, then, is whether *any* conviction for second degree assault would demonstrate the "physical force," "attempted" or "threatened" physical force, or "substantial risk" of physical force required for the crime to be considered a "crime of violence" or whether, as Petitioner argues, the statute is in fact "divisible," such that the "physical force"

requirement would not necessarily be demonstrated by the mere fact of conviction under the statute.

As discussed more fully below, *see infra* at 16-19, the Court concludes that any second degree assault constitutes a "crime of violence," due to the combination of specific intent, actual injury and causation required for conviction. Other than the felony assault subsection (Subsection 6), each of the offenses covered by Section 120.05 include, as a specified element of the offense, some form of specific intent to cause physical injury. (*See, e.g.,* N.Y. Penal Law § 120.05(1) (making a person guilty of second degree assault when "[w]ith intent to cause serious physical injury to another person, he causes such injury to such person or to a third person").)[15] Only the Subsection 6 does not explicitly require this specific intent. Furthermore, the underlying felony referred to in Subsection 6 need not, itself, be a violent felony. *See People v. Fonseca*, 36 N.Y.2d 133, 136, 365 N.Y.S.2d 818, 821 (1975) (observing that the first degree felony assault statute, New York Penal Law Section 120.10(4), does not specify that only violent felonies may serve as underlying felonies). Thus, it appears that, if the minimum elements necessary to sustain a conviction under Subsection 6 are sufficient to meet the "crime of violence" definition set out in 18 U.S.C. § 16, then any conviction for second degree assault would be sufficient to meet that definition, and the statute is therefore not divisible.

(ii) Analysis of N.Y. Penal Law § 120.05(6) under 18 U.S.C. § 16(a)

Respondent argues that Subsection 6 meets the "crime of violence" definition contained in 18 U.S. C. § 16(a), which, as noted above, applies where the criminal offense has, as an

[15] Every subsection includes the other elements of injury and causation. See N.Y. Penal Law § 120.05.

element, "the use, attempted use, or threatened use of physical force against the person or property of another." On this point, however, Respondent merely points out that Subsection 6 "required [Petitioner] to have 'cause[d] physical injury to a person other than one of the participants [in the predicate felony].'" (Resp. Opp. at 6.) From this alone, Respondent concludes: "Accordingly, it is clearly a crime of violence as defined in 18 U.S.C. [S]ection 16(a) because one of the elements of the crime involves the use of physical force against another person." (*Id.*)

This argument makes the leap that causation of "physical injury" is equivalent to the use of "physical force," which is not necessarily correct. "Physical injury," as defined by the New York Penal Law, means the "impairment of physical condition or substantial pain." N.Y. Penal Law § 10.00(9). "Nothing in this [] definition under the [New York] statute includes as an element the use, attempted use, or threatened use of physical force against the person or property of another." *Sweetser*, 1999 WL 311950 (analyzing a criminal negligence definition and determining that, to be a "crime of violence" under Section 16(a), "the elements of the offense must be such that physical force is an element of the crime").[16] Therefore, the Court must look to 18 U.S.C. § 16(b), to determine whether the definition set forth therein is satisfied by the offense at issue.[17]

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[16] *See also* discussion of *Dalton, infra* at 17-18.

[17] Although Respondent argues that Petitioner's conviction is for a crime of violence under Section 16(a) (*see* Resp. Opp. at 6), it alternately cites to Section 16(b) (*see id.* at 5).

(iii) Analysis of N.Y. Penal Law § 120.05(6) under 18 U.S.C. § 16(b)

This Court has not found any judicial authority directly addressing the question of whether the crime of felony assault meets the requirements of 18 U.S.C. § 16(b) – that is, whether, "by its nature," felony assault is a crime that "involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16(b); *see Sweetser,* 1999 WL 311950 (under Section 16(b), a felonious offense must "by its nature" must be such "that its commission would ordinarily present a risk that physical force would be used against the person or property of another, irrespective of whether the risk develops or harm actually occurs") (citing *Matter of Alcantar*, Int. Dec. 3220, 1994 WL 232083 (BIA May 25, 1994) (internal quotations omitted)). Because an offense must be analyzed "by its nature" to determine whether it is a Section 16(b) crime of violence, this Court's analysis must focus "on the intrinsic nature of the offense rather than on the factual circumstances surrounding any particular violation." *Dalton*, 257 F.3d at 204; *see also Alcantar,* 1994 WL 232083 ("Section 16(b) contemplates a generic category of offenses which typically present the risk of injury to a person or property irrespective of whether the risk develops or harm actually occurs.").

In *Dalton,* the Second Circuit rejected a BIA determination that a "DWI" conviction was, by its nature, a crime that would present the risk that physical force would be used. Although the government argued that the act of driving while intoxicated gave rise to a substantial risk that someone would suffer injury as a result, *see Dalton,* 257 F.3d at 206, the Court distinguished a risk of "injury" from a risk of the "use of physical force," noting that "[t]here are many crimes," including crimes of gross negligence and reckless endangerment, "that involve a substantial risk

of injury but do not involve the use of force, *id.* at 207. Highlighting the "sweeping" nature of the state law at issue (N.Y. Vehicle & Traffic Law § 1192.3), which allowed for conviction even in situations involving accidents with "no risk that force may be used or that injury may result," the Court emphasized that a crime of violence must involve a risk of the actual or potential *application* of force. *Id.* at 205-07. Given that "only the minimum criminal conduct necessary to sustain a conviction under a given statute is relevant," the Court determined that, under the categorical approach of 18 U.S.C. § 16(b), "not all violations of NYVTL § 1192.3 are 'by their nature' 'crimes of violence,'" and therefore a conviction under this statute did not constitute a crime of violence. *Id.* at 204-208 (internal quotations and citation omitted).[18]

Here, the "nature" of the assault crime at issue involves much more than the DWI offense considered by the Second Circuit in *Dalton*. For one thing, actual physical injury is a required element of the felony assault offense and, as Respondent points out (*see* Resp. Opp. at 6), such injury has to have been "caused" by an actor in the offense, removing from the statute's purview a situation where, during the course of a crime, a third party is accidentally injured in a manner not causally related to the actor's conduct. In addition, although, as noted above, the felony assault provision does not explicitly include a specific intent element, the New York courts have explained that, through the doctrine of constructive malice, "the intent necessary to sustain the conviction for felony assault is inferred from the intent to commit the underlying

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[18] After *Dalton* and similar rulings from the Fifth, Seventh and Ninth Circuits, the BIA itself reconsidered this issue and determined that a conviction of operating a vehicle while intoxicated did not constitute a crime of violence under Section 16(b). *See In re Ramos*, Int. Dec. 3468, 2002 WL 1001049 (BIA Apr. 4, 2002). Further, the BIA has now opined that a crime of violence under Section 16(b) would require a substantial risk of an affirmative use of force, as well as a specific intent of at least recklessness. *See id.*

felony." *People v. Spivey,* 81 N.Y.2d 356, 361, 599 N.Y.S.2d 477, 480 (1993); *accord People v. Snow,* 138 A.D.2d 221, 530 N.Y.S.2d 915 (4th Dep't 1988). Because the underlying felony must therefore require a culpable state of mind, a DWI offense, such as that which concerned the Second Circuit in *Dalton,* cannot serve as a predicate felony for a charge of felony assault, under New York law. *See Snow,* 138 A.D.2d 217, 530 N.Y.S.2d 913.[19]

Taking all of this together – that a conviction for felony assault under New York law requires proof that, in the course of and in furtherance of a specific intent felony, a participant in that felony caused someone actual injury (and through the doctrine of constructive malice, intended to cause that injury) – this Court is unable to imagine how any such offense would not involve at least the "substantial risk" that physical force "may be used" during the course of the offense. The Court therefore concludes that, by its nature, the crime of felony assault under New York Penal Law Section 120.05(6) is properly deemed a "crime of violence" under 18 U.S.C. § 16(b). As a result, and because the term of imprisonment for the offense is at least one year, this crime is properly considered an "aggravated felony" under the INA. Further, because any conviction under the remaining subsections of New York Penal Law Section 120.05 also require, at a minimum, proof that an actor with a specific intent to cause actual injury caused such injury,

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[19] In *Snow*, the defendant injured a pedestrian as a result of driving while intoxicated. *Snow,* 138 A.D.2d at 218, 530 N.Y.S.2d at 913. In addition to being charged with vehicular assault and a number of other crimes, the defendant was charged with first degree felony assault *see id.,* 138 A.D. at 218, 530 N.Y.S.2d at 913-14, which differs from second degree felony assault (the offense at issue in this case) only in that it requires that the victim's physical injury be "serious." *Compare* N.Y. Penal Law § 120.10(4) *with* N.Y. Penal Law § 120.05(6). After considering the legislative history of the felony assault statute, the Court concluded that proof of intent to commit the underlying felony had always been, and remained necessary. *Snow,* 138 A.D.2d at 221-22, 530 N.Y.S.2d at 915. Therefore, the Court concluded that the defendant could not be convicted of felony assault "based upon the underlying felony of DWI which requires no culpable mental state." *Id.*, 138 A.D.2d at 222, 530 N.Y.S.2d at 916.

all offenses under this statute would properly be deemed "crimes of violence" under Section 16(b), and thus the statute is not divisible.

In sum, the BIA's determination that Petitioner was convicted of an aggravated felony was not in error, and I recommend that Petitioner's final claim be dismissed.

CONCLUSION

For the foregoing reasons, I recommend that Petitioner's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 be dismissed.

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from service of this Report to file written objections. *See also* Fed. R. Civ. P. 6. Such objections, and any responses to objections, shall be filed with the Clerk of Court, with courtesy copies delivered to the chambers of the Honorable Jed S. Rakoff, United States Courthouse, 500 Pearl Street, Room 1320, New York, New York 10007, and to the chambers of the undersigned, United States Courthouse, 40 Centre Street, Room 631, New York, New York, 10007. Any requests for an extension of time for filing objections must be directed to Judge Rakoff. FAILURE TO FILE OBJECTIONS WITHIN TEN (10) DAYS WILL RESULT IN A WAIVER OF OBJECTIONS AND WILL PRECLUDE APPELLATE REVIEW. *See Thomas v. Arn*, 474 U.S. 140, 155 (1985); *IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1054 (2d Cir. 1993); *Frank v. Johnson*, 968 F.2d 298, 300 (2d Cir. 1992);

Wesolek v. Canadair Ltd., 838 F.2d 55, 58 (2d Cir. 1988); *McCarthy v. Manson*, 714 F.2d 234, 237-38 (2d Cir. 1983).

Dated: New York, New York
June 24, 2002

Respectfully submitted,

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DEBRA FREEMAN
United States Magistrate Judge

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